No. 88-295

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

LOCAL UNION 598,
PLUMBERS & PIPEFITTERS INDUSTRY
JOURNEYMEN & APPRENTICES TRAINING FUND,
Plaintiff-Appellant,

VS.

J.A. JONES CONSTRUCTION COMPANY,
BECHTEL POWER CORPORATION and
JOHNSON CONTROLS, INC.
Defendants-Appellees.

BRIEF OF APPELLEE BECHTEL POWER CORPORATION IN OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF THE FOUNDATION FOR FAIR CONTRACTING AS AMICUS CURIAE

PAUL R. HAERLE
Counsel of Record
WILLIAM F. HOEFS
JANET FRASER BENTLEY
JACK A. SCHWARTZMAN
THELEN, MARRIN, JOHNSON & BRIDGES
Two Embarcadero Center
San Francisco, CA 94111
Counsel for Appellee
Bechtel Power Corporation

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES

Statutes and Rules

Other Authorities

No. 88-295

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

LOCAL UNION 598,
PLUMBERS & PIPEFITTERS INDUSTRY
JOURNEYMEN & APPRENTICES TRAINING FUND,
Plaintiff-Appellant,

VS.

J.A. JONES CONSTRUCTION COMPANY,
BECHTEL POWER CORPORATION and
JOHNSON CONTROLS, INC.
Defendants-Appellees.

BRIEF OF APPELLEE BECHTEL POWER CORPORATION IN OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF THE FOUNDATION FOR FAIR CONTRACTING AS AMICUS CURIAE

Bechtel Power Corporation ("Bechtel"), appellee in the above-titled matter, hereby opposes the Motion for Leave to File Brief Amicus Curiae and Brief of the Foundation for Fair Contracting as Amicus Curiae ("Am. Br.") filed by the Foundation for Fair Contracting ("FFC") with the Court. For the reasons stated below, Bechtel opposes the FFC's Motion for Leave to File and Amicus Curiae Brief pursuant to Rules 36.3 and 42.4 of this Court.

SUMMARY OF ARGUMENT

The Court should deny the FFC leave to file a brief *amicus curiae* because the FFC's application for leave and proposed *amicus* brief offer the Court no assistance in analyzing the legal issues presented by the appeal herein. Pursuant to the Court's standards, the FFC's submission is deficient and further consideration of it would constitute a waste of the Court's valuable judicial resources.

The FFC's brief revolves around two premises: (1) that the state statute at issue in this case, Wash.Rev.Code § 39.12.010, produces a "mere economic effect" on an ERISA-regulated[1] employee welfare benefit plan and does not regulate the terms of the plan and (2) that a "mere economic effect" of a state statute on an ERISA plan is not sufficient to compel preemption under section 514(a) of ERISA, 29 U.S.C. § 1144(a). The arguments contained in the FFC's brief are wholly encompassed within the briefs already filed with the Court by Bechtel and by appellant Local 598, Plumber & Pipefitters Industry Journymen & Apprentices Training Fund (hereinafter "appellant" or "Local 598") and are factually and legally unsupportable. Moreover, the broad speculation contained in the FFC's brief does not draw upon the purported expertise of the FFC with regard to prevailing wage legislation and simply repeats the arguments already presented to the Court. The FFC's motion for leave to file a brief *amicus curiae* should therefore be denied.

---

[1] "ERISA" as used herein refers to the Employee Retirement Income Security Act of 1974, Public L. No. 93-406, 88 Stat, 829 (1974) as amended. ERISA is codified within 5, 18, 26, 29 and 31 U.S.C. Relevant sections are set forth at Appendix D to Appellant's Jurisdictional Statement on Appeal from the United States Court of Appeals for the Ninth Circuit ("Jurisd. Stmt.").

ARGUMENT

I

LEAVE TO FILE A BRIEF AMICUS CURIAE SHOULD BE DENIED BECAUSE THE FFC'S PROPOSED BRIEF MERELY REPEATS THE ARGUMENTS ALREADY PRESENTED TO THE COURT

The FFC's brief simply restates the arguments presented by Local 598 in its Jurisdictional Statement ("Jurisd. Stmt.") and should therefore be rejected. This Court examines an *amicus curiae* brief "solely for whatever aid it provides [the Court] in analyzing the legal questions before [it]...." *Sony Corporation v. Universal City Studios*, 464 U.S. 417, 434 n.16 (1984). The stated desires of *amici* concerning the outcome of a case are not evidence and do not influence the Court's decision. *Id.*

Relying principally on *Mackey v. Lanier Collection Agency*[2] and *Fort Halifax Packing Company v. Coyne*[3], the FFC, like Local 598, attempts to cut a jagged edge into a comprehensive scheme of federal preemption under ERISA. (*See* Jurisd. Stmt. at 8-9). The FFC claims that Congressional silence regarding the terms of employee welfare benefit plans demonstrates a clear intent to render ERISA plans subject to state regulation of their terms. (Am. Br. at 10-11.) The FFC argues that preemption in the present case would defeat federal goals (Am. Br. at 4, 11) and predicts widespread negative social effects stemming from preemption of the Washington statute. (Am. Br. at 2.) Each of these arguments was presented by Local 598 in its Jurisdictional State-

---

[2] 108 S.Ct. 2182 (1988).

[3] 107 S.Ct. 2211 (1987).

ment[4] and was addressed in Bechtel's Motion to Dismiss or Affirm ("Mot. Dism.").[5]

The only substantive argument raised by the FFC which does not appear in Local 598's Jurisdictional Statement is the claim that the Washington prevailing wage statute does not regulate the terms of employee welfare benefit plans. (Am. Br. at 10-11.) This spurious[6] claim was raised by Local 598 below,[7] and was explicitly rejected by the Ninth Circuit in its opinion. (Jurisd. Stmt. at A-13.) Local 598 sounded a retreat in its Jurisdictional Statement both by failing to refute the Ninth Circuit's holding that the Washington statute *does* regulate the terms of employee welfare benefit plans and by arguing that ERISA preemption does not extend to state laws *regulating funding* of employee welfare benefit plans. (Jurisd. Stmt. at 10.)

The present case clearly represents an effort by an *amicus* to advance Local 598's position through repetition. While the FFC's interest in the matter may be valid in the abstract, its *amicus curiae* brief fails to set forth facts or questions of law which have not been, or will not adequately be, presented by the parties. *Cf.* United States Supreme Court Rule 36.3.[8] The Court should not sanction this wasteful attempt to restate arguments already before it.

---

[4] (*See* Jurisd. Stmt. at 9 (Congressional silence); Jurisd. Stmt. at 7 (federal policy); Jurisd. Stmt. at 8 (allegedly broad implications of Ninth Circuit ruling).)

[5] (*See* Mot. Dism. at 5, 8 (Congressional silence); Mot. Dism. at 7 n.9, 8 (federal policy); Mot. Dism. at 8 (implications of Ninth Circuit ruling).)

[6] The deficiencies in the FFC's preemption argument regarding the absence of explicit Congressional regulation of the terms of ERISA plans are addressed in Bechtel's Motion to Dismiss or Affirm at 5-9.

[7] (*See* Appellant's Opening Brief to the United States Court of Appeals for the Ninth Circuit (No. 85-3894) at 12-17.)

[8] Although Rule 36.3 does not expressly govern *amicus* briefs filed before review is granted, *amicus* briefs filed at any time should continue to comply with Rule 36.3. R. Stern, E. Gressman and S. Shapiro, *Supreme Court Practice* (6th Ed. 1986) at 396.

II

THE FCC'S PROPOSED AMICUS CURIAE BRIEF RAISES ARGUMENTS WHICH ARE FACTUALLY AND LEGALLY UNSUPPORTABLE

Given the fact that the arguments contained in the FFC's proposed brief *amicus curiae* have already been briefed by both Bechtel and Local 598, Bechtel will not burden the Court with a correspondingly redundant recitation of its prior arguments. In the interest of judicial economy, Bechtel's Motion to Dismiss or Affirm is therefore incorporated by reference herein, as it responds directly to the arguments raised in the FFC's *amicus curiae* brief.

Nevertheless, a few points raised by the FFC in its proposed *amicus curiae* brief merit emphatic opposition:

1. The Washington State Statute in the Present Case Purports to Regulate the Terms of an Employee Welfare Benefit Plan and Does So in Fact

The FFC attempts an ambitious logical leap by asserting that a statute which requires specific contributions by employers to ERISA-regulated employee welfare benefit plans does not regulate, or purport to regulate, the terms of such plans. (Am. Br. at 10-11.) The FFC asks the Court to adopt this implausible assumption by applying a distinction between "mere economic effect" on ERISA plans and "regulation" of such plans. (Am. Br. at v, 2, 4, 5.) While this distinction has been validly applied to remove state statutes with remote, incidental effects on ERISA plans from the scope of ERISA preemption under section 514(a),[9] this analysis has never been extended to statutes like the

---

[9] *E.g., Mackey v. Lanier Collection Agency*, 108 S.Ct. 2182 (1988) (garnishment statute); *Lane v. Goren*, 743 F.2d 1337 (9th Cir. 1984) (employment discrimination statute); *Champion International Corp. v. Brown*, 731 F.2d 1406 (9th Cir. 1984) (age discrimination statute); *American Telephone and Telegraph Co. v. Merry*, 592 F.2d 118 (2d Cir. 1979) (garnishment statute).

Washington prevailing wage statute herein which clearly create funding requirements for ERISA plans. *E.g., Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981); *Stone & Webster Engineering Corp. v. Ilsley*, 518 F.Supp. 1297, 1299-1301 (D.Conn. 1981), *aff'd*, 690 F.2d 323 (2d Cir. 1982), *aff'd mem. sub nom., Arcudi v. Stone & Webster Engineering Corp.*, 463 U.S. 1220 (1983); *Hewlett-Packard Co. v. Barnes*, 425 F.Supp 1294, 1297-1300 (N.D.Cal. 1977), *aff'd*, 571 F.2d 502 (9th Cir.), *cert. denied*, 439 U.S. 831 (1978). In fact, *Martori Bros. Distributors v. James-Massengale*, 781 F.2d 1349 (9th Cir.), *cert. den.*, 107 S.Ct. 435, 670 (1986), cited by the FFC in support of its position, specifically categorizes statutes which create funding requirements for ERISA plans as *within* the scope of ERISA preemption. *Id.* at 1356-57.

The FFC euphemisticlly describes Wash.Rev.Code § 39.12.010 as a statute which "encourages" the payment by employers of fringe benefits "as an incidental effect." (Am. Br. at 4.) The FFC's semantics can not escape the plain facts that (1) pursuant to the state statute payment of benefits by public works contractors is *compelled*, rather than encouraged[10], (2) levels of employer contributions to employee welfare benefit plans relate to "terms or conditions" or such plans[11], and (3) specific minimum levels of contributions are established by the state statute notwithstanding the terms set forth in collective bargaining agreements.[12] The fact that the state statute here confers economic benefits on employee welfare benefit plans is irrelevant and misleading; it does not convert a compulsory measure establishing specific contribution levels from "regulation" to "mere economic effect."

American Telephone and Telegraph Co. v. Merry, 592 F.2d 118 (2d Cir. 1979) (garnishment statute).

[10] Wash.Rev.Code §§ 39.12.020, 39.12.021.

[11] *Martori Bros. Distributors*, 781 F.2d at 1357.

[12] The Washington statute requires employers to pay "usual benefits," Wash.Rev.Code § 39.12.010(1), which is calculated by the industrial statistician of the state department of labor and industries, Wash.Rev. Code § 39.12.015, pursuant to statutory criteria. Wash.Rev.Code § 39.12.010(3)(b).

2. The Ninth Circuit's Ruling Below Is Consistent With Well-Established ERISA Preemption Doctrine

As noted in Bechtel's Motion to Dismiss or Affirm, the Ninth Circuit's ruling below is entirely consistent with the decisions of this Court and lower federal courts on ERISA preemption.[13] The FFC, relying primarily on the *Fort Halifax* and *Mackey*[14] cases, vainly attempts to characterize the Washington state statute in the present case as a state measure which does not intrude upon matters regulated by ERISA or preserved from state regulations by ERISA. (Am. Br. at 7-9.) Closer examination of these cases reveals that they are inapplicable to the present context and fail to refute the conclusion that a statute which establishes levels of employer contributions to employee welfare benefit plans clearly intrudes on the concerns of ERISA preemption.

The FCC draws language from *Fort Halifax* without examining the critical underpinnings of the Court's holding there. In *Fort Halifax,* a Maine statute specifying levels of one-time lump sum severance payments by employers was held to be free from preemption under ERISA. The bases of the Court's ruling were that the statute merely regulates "benefits," rather than "plans," *id.* at 2215-16, that the requirement of *one-time* lump sum payments does not invoke ERISA's concern with the vulnerability of *ongoing* administrative programs to conflicting state regulations, *id.* at 2216-19, and that the severance pay requirement of the Maine statute in question is not an ERISA "plan." *Id.* at 2219-20.

Here, by contrast, the Washington state statute regulates employer contributions to ERISA-regulated employee welfare benefit plans, rather than levels of benefits. Of particular importance is the fact that the Washington statute contemplates regular, continual payments by employers pursuant to a previously-established benefit scheme, rather than a one-time lump sum payment. In *Fort Halifax,* this Court noted:

---

[13] (*See* Mot. Dism. at 6-7 n.8.)

[14] The inapplicability of *Mackey* to the present case is discussed in Bechtel's Motion to Dismiss or Affirm at 7 n.9.

> [Section 514(a) of ERISA] was prompted by recognition that employers establishing benefit plans are faced with the task of coordinating complex administrative activities. A patchwork scheme of regulation would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without plans to refrain from adopting them. Pre-emption ensures that the administrative practices of a benefit plan will be governed by only a single set of regulations. 107 S.Ct. at 2217.

In *Fort Halifax*, the Court examined the federal concerns with uniformity in the administration of ERISA plans and found them lacking in the context of a one-time lump sum mandatory severance payment. Given the ongoing nature of the obligation imposed by the Washington statute, the *Fort Halifax* rationale clearly supports the holding of the Ninth Circuit below. Thus, by advancing *Fort Halifax* in support of its position the FFC elevates result over reasoning; the mere fact that the Court in *Fort Halifax* did not find the state statute preempted does not alter the conclusion that *Fort Halifax*, by its own terms, compels preemption in the present case.[15]

3. The FFC's Prediction of Inevitable Widespread Negative Effects on State Prevailing Wage Legislation Is Unwarranted

As noted in Bechtel's Motion to Dismiss or Affirm, fewer than half of the 23 state prevailing wage statutes presently in effect even mention the word "benefit." (Mot. Dism. at 8 n.10.) While

---

[15] The FFC further confuses the issues presented on appeal by suggesting that the holding in *Hydrostorage, Inc. v. Northern California Boilermakers Local Joint Apprenticeship Committee*, 685 F.Supp. 718 (N.D. Cal. 1988) is a product of the Ninth Circuit's reasoning below. (Am. Br. at 4-5.) *Hydrostorage* is not presently before this Court nor are the merits of its holding at issue here. Moreover, *Hydrostorage* was decided without reliance on the Ninth Circuit's opinion below. It is therefore inappropriate for the FFC to advance *Hydrostorage* in support of its "domino theory" of preemption of prevailing wage legislation purportedly resulting from the Ninth Circuit's holding.

it would be sheer speculation for Bechtel to assume that every prevailing wage statute which is silent on its face regarding benefits will not be preempted under ERISA, it is even more precarious to suggest, as do Local 598 and the FFC, that all state prevailing wage statutes, regardless of their treatment of benefits, will be affected by the decision of the Ninth Circuit below. (*See* Jurisd. Stmt. at 8 n.4; Am. Br. at 4.) Instead, the appropriate policy analysis should focus on the federal interests which are unmistakably implicated by the present appeal: a comprehensive and exclusive regulatory scheme for employee benefit plans and the paramountcy of the collective bargaining process. (*See* Mot. Dism. at 8.) Preemption in the present case is necessary to uphold these important federal concerns.

* * *

The FFC's legal argument is flawed because it attempts to augment the few narrowly-defined areas of state regulation which are free from preemption under ERISA section 514(a), such as garnishment statutes and anti-discrimination laws, with a category of state laws which clearly impinges upon the terms of ERISA plans and the concerns of Congress in enacting ERISA. This strained construction of ERISA preemption doctrine lacks any basis whatsoever in Congressional intent, federal policy or judicial precedent. Local 598's appeal is therefore without merit and fails to present a substantial federal question to the Court.

CONCLUSION

For the reasons stated herein and in Bechtel's Motion to Dismiss or Affirm, the Motion of the FFC for Leave to File a Brief Amicus Curiae should be denied. Furthermore, Local 598's appeal should be dismissed, or in the alternative, the holding of the Ninth Circuit below should be affirmed.

Dated: September 27, 1988

Respectfully submitted,

THELEN, MARRIN, JOHNSON & BRIDGES
PAUL R. HAERLE
Counsel of Record
WILLIAM F. HOEFS
JANET FRASER BENTLEY
JACK A. SCHWARTZMAN
Counsel for Appellee
Bechtel Power Corporation